EMPLOYMENT TRIBUNALS

Claimant: Mr S P Delmonaco

Respondent: North West Air Ambulance Charity

Heard at: Manchester (in person/CVP) **On:** 17 and 18 September 2020

Before: Employment Judge Dunlop
Mrs S A Humphreys
Mr T Walker

REPRESENTATION:

Claimant: Mr M Mensah (Counsel)
Respondent: Ms R Eeley (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim under section 15 Equality Act 2010 (discrimination arising from disability) succeeds.

2. The claimant's claim under s13 Equality Act 2010 (direct discrimination) fails and is dismissed.

3. The claimant's claim under s19 Equality Act 2010 (indirect discrimination) is dismissed upon withdrawal.

4. The claimant's claim under ss20-21 Equality Act 2010 (failure to make reasonable adjustments) fails and is dismissed.

5. Compensation due to the claimant will be determined at a remedy hearing on **18 November 2020** if not resolved by agreement before that date.

REASONS

Introduction

1. By a claim form presented on 29 August 2018 Mr Delmonaco brought claims against his former employer North West Air Ambulance Charity (the respondent). Those claims were all claims of disability discrimination and primarily related to his dismissal on 15 May 2019.

The Hearing

2. The panel heard the claim over two days and heard from the following witnesses:

(1) For the claimant, Mr Delmonaco himself;

(2) For the respondent:

(a) Mr Paul Freethy, Head of Retail;

(b) Ms Marie Davies, Director of Income and Engagement;

(c) Mrs Catrin Weston, HR Consultant.

3. The Tribunal had regard to an agreed bundle of documents prepared by the parties. No additional documents were submitted during the hearing.

4. The Code V in the header of this Judgment indicates that this was a hearing conducted partly by Cloud Video Platform ("CVP"). In this case both non-legal members attended by CVP. The Judge, the parties and their representatives and all witnesses were all present in the Tribunal room, save that (due to numerical restrictions in the room) one of the respondent's witnesses observed by CVP when not giving their evidence.

The Issues

5. There was a case management hearing in this case held on 25 November 2019 before Employment Judge Robinson. EJ Robinson commented that the claim was well-pleaded and noted that, although Mr Delmonaco was a litigant in person, he was being assisted by his wife who is a Local Authority solicitor with knowledge of employment law. The claim does specifically plead each of the relevant sections of the Equality Act. EJ Robinson noted that the 'Provision, criterion or practice' (PCP) relied upon for the indirect discrimination claim was not identified, and this was discussed during the hearing. EJ Robinson ordered that the parties produce an agreed list of issues, which was duly done. That document identifies PCPs (relying on the same ones in respect on indirect discrimination and reasonable adjustments) and also identified the matters relied on as being 'something arising' for the purposes of the s.15 claim.

6. The full List of Issues was as follows:

Direct Discrimination (section 13 EqA 2010)

Was Mr Delmonaco treated less favourably because of a protected characteristic, namely disability, by the respondent?

The less favourable treatment was the decision to dismiss Mr Delmonaco.

Indirect Discrimination (section 19 EqA 2010)

Did the respondent apply a provision, criterion or practice which placed Mr Delmonaco as a disabled person at a disadvantage?

The PCPs relied on by Mr Delmonaco are:

(1) The respondent's policy not to allow Mr Delmonaco to carry out lone working due to his condition;

(2) The respondent's absence management policy placed Mr Delmonaco at a disadvantage;

(3) The requirement by the respondent that he attend an Occupational Health assessment following the incident on 17 April 2019.

If Mr Delmonaco can establish that the above are PCPs and that they placed Mr Delmonaco at a disadvantage, can the respondent show that the PCPs were a proportionate means of achieving a legitimate aim?

Disability arising from discrimination (section 16 EqA 2010)

Did the respondent discriminate against Mr Delmonaco because of something arising as a consequence of his disability? The "something arising" is:

(1) Mr Delmonaco's sickness absence;

(2) Mr Delmonaco's request for adjustments to enable him to return to work;

(3) The respondent's perception of his disability; and

(4) Mr Delmonaco's dismissal.

If so, can the respondent show that this treatment was a proportionate means of achieving a legitimate aim?

Failure to make reasonable adjustments (section 20 EqA 2010)

If the respondent applied a PCP as defined above which placed Mr Delmonaco at a substantial disadvantage when compared with those who are not disabled, did the respondent take such reasonable steps to overcome the disadvantage?

If the respondent did not take such steps, did it fail to comply with its duty to make reasonable adjustments?

7. At the outset of this hearing I asked counsel to confirm whether the agreed List of Issues still represented a complete and accurate list of the matters that the Tribunal would be asked to determine. Both counsel at that point expressly confirmed that that was the case.

8. Subsequently, at the conclusion of the evidence, and before making oral submissions, counsel exchanged and presented to the Tribunal extensive written submissions. It became apparent from the content of Mr Mensah's written submissions that he was seeking to rely on substantially different PCPs than had been defined in the List of Issues. He was also seeking to rely, it appeared, on different matters said to be arising from the disability.

9. The Tribunal heard submissions on whether and the extent to which we could determine the case based on these new matters. Those submissions and our conclusions are outlined below.

Findings of Fact

10. This section sets out the relevant facts as the Tribunal has found them.

Mr Delmonaco's disability and career history

11. Mr Delmonaco suffers from a genetic condition called Marfan syndrome which affects the connective tissues that hold organs in place. He is under consultants at St Mary's Hospital, Manchester, and has annual x-rays and ECGs to monitor and manage the condition. Marfan syndrome can have a variety of effects for its sufferers, both in terms of severity, but also in terms of the varying organs and systems which are affected. In Mr Delmonaco's case the primary effect relates to his lungs, and as a result of this condition, he is susceptible to spontaneous pneumothorax (commonly known as a punctured lung).

12. As a young man Mr Delmonaco had a pleurectomy operation which is a procedure to stabilise the lung and prevent it from collapsing. Mr Delmonaco was able to have this procedure on his right lung but his left lung remains prone to pneumothorax. It was stated on several occasions during the evidence that this occurs on average of once a year. The Tribunal has no reason to doubt this figure although we acknowledge that it is a broad-brush approximation.

13. Mr Delmonaco stated that when he experiences a pneumothorax event it can be of varying severity. There was some dispute as to whether Mr Delmonaco may lose consciousness on these occasions. His evidence to us was that he would not, but there were instances in meeting notes where he appeared imply that he had done so in the past and, for example, that paramedics might be required to lock up his house. He explained that, prior to the pleurectomy, he did lose consciousness on some occasions. We accept his evidence that he has not, in fact, lost consciousness in the fifteen years since the operation. However, this does not detract from the fact that such an episode would be an emergency situation requiring the attendance of an ambulance and emergency hospitalisation.

14. After such an event Mr Delmonaco requires recovery time, and during this period his physical abilities are reduced. More generally, Marfan syndrome means he can get fatigued easily and because of this he has generally limited himself to part-time work.

15. The respondent accepts (and has accepted throughout) that this condition amounts to a disability within s.6 Equality Act 2010 ("EqA").

16. Mr Delmonaco has held a variety of roles throughout his working life. He held front of house roles at Burnley Mechanics Theatre from 2004 to 2015 and then at Oswaldtwistle Civic Theatre from 2015 to 2017. In February 2018, Mr Delmonaco began working in the charity retail sector, taking a role with the International Aid Trust as a temporary Relief/Support Manager. In this role he ran various charity shops in Lancashire in the absence of a permanent manager. This included locations such as Leyland, Chorley and Blackburn. Mr Delmonaco states (and we accept) that he undertook this role successfully, and that it included a significant amount of lone working and manual handling of goods sold by the shops. We further accept that an Area Manager was available to cover his shifts if he fell ill, and that he was dismissed by reason of redundancy following the closure of a number of shops.

17. The respondent's witnesses referred to the fact that no reference had been obtained for Mr Delmonaco's work in International Aid Trust. There seemed to be a suggestion of scepticism about whether Mr Delmonaco had in fact been successful in that role as he described. However, in the absence of any evidence to the contrary, we fully accept Mr Delmonaco's evidence in relation to his working history. We see no reason why Mr Delmonaco would pursue roles in a sector if he considered himself ill-suited to it. His experience at International Aid Trust had convinced him that charity retail was a sector he was suited to, and it was that which led to him seeking opportunities with the respondent.

Recruitment

18. The respondent is a well-known regional charity employing around 80 people. For the purposes of generating income for its charitable work it runs a network of charity shops. In early 2019, Mr Delmonaco applied for a job as store manager of the respondent's Blackburn 'At Home' store. On 5 February 2019 he attended an interview for that role. Mr Delmonaco says that he disclosed information about his disability at that interview. The respondent refutes this, although none of its witnesses were present at the interview. This was a full-time role and we find that Mr Delmonaco told the interviewers that he would prefer to do the job on a part-time or job share basis due to his disability, and therefore gave some further information about that disability. None of the interviewers recorded the information on their interview notes (which were recorded on a template based on the interview questions). Mr Delmonaco's application for the Store Manager role was unsuccessful and we find that his disclosure was therefore not made known to HR or anyone in the wider organisation.

19. The respondent subsequently advertised for the role of retail assistant in the same store. Mr Delmonaco applied and attended a further interview on 19 February 2019. One of the panel members at this interview was Mr Freethy. There was a conflict of evidence between Mr Delmonaco and Mr Freethy as to whether or not Mr Delmonaco mentioned his disability at this interview. On balance we prefer the evidence of Mr Freethy. Unlike the store manager role, this role was part-time and so the reason for Mr Delmonaco bringing the matter up in the first interview did not

apply. We do not find that Mr Delmonaco was giving evidence dishonestly in this respect but we find that he has probably conflated the first and second interviews.

20. We pause there to note that the parties agree that the respondent did not question Mr Delmonaco about his disability at the interview stage. To the extent that it was mentioned in either interview, it was brought up by Mr Delmonaco. Section 60 EqA generally prohibits an employer from asking questions about medical matters at an interview stage. However, there is an exception where asking such a question is necessary for the purposes of establishing whether the candidate will be able to carry out a function that is intrinsic to the work concerned. The respondent's equal opportunities policy contained the following in relation to recruitment exercises (reflecting s.60):

> *"We will not ask unnecessary questions about an applicant's personal affairs during the recruitment process. Questions about a prospective employee's health will usually be left until the offer stage unless the questions are raised to identify any particular needs for the recruitment process, for a genuine occupation need or because we wish to establish at the outset the ability of a candidate to perform an intrinsic feature of the job e.g. heavy lifting."*

21. Given the reliance now placed by the respondent on supposedly critical demands of the role in terms of heavy lifting, lone working and overtime, we find it surprising that none of these were identified in the job advertisement or job description (or, at least, we must assume that to be the case as neither document was produced for the bundle and the respondent's witnesses have not suggested to the contrary). Further, none are mentioned in the terms and conditions document issued to Mr Delmonaco. There were no questions asked at interview about a candidate's ability to undertake heavy-lifting or lone working. Candidates were asked about their flexibility to undertake paid overtime to cover holidays and sickness (not, it would appear, their ability to do overtime on a continuous basis). The interview notes at p52 indicate that Mr Delmonaco agreed he could offer such flexibility.

The Blackburn 'At Home' Store

22. There was little evidence in the witness statements or bundle about the Blackburn At Home store itself. Under questions from the Tribunal both Mr Delmonaco and Mr Freethy gave descriptions of the store from which we make the following findings of fact:

23. The store was a large charity shop premises of around 4,000 square feet which incorporated a large 'warehouse' area which was not accessible to the public. From the shop, the respondent sells furniture including large items of furniture such as beds and dining tables. A large area of the shop floor is giving over to room sets where the furniture is displayed and accessorised as it may be in a home. The store also sells smaller furniture items as well as a full range of other goods normally available for purchase in a charity shop, for example clothes, books and bric-a-brac. Donations and collection of furniture may be arranged by appointment, in which case dedicated warehouse staff will attend those appointments. However, members of the public do also bring items to donate on an *ad hoc* basis, including furniture.

24. The shop opens seven days per week and only two paid employees are employed in the shop: the shop manager (contracted to work five days) and the retail assistant (contracted to work three days). This means that for most, but not all, of Mr Delmonaco's shifts he would be the only paid member of staff. If the store manager was absent due to sickness or holidays the respondent would expect the retail assistant to pick up two extra shifts (taking their working hours to 35) to cover that absence. The remaining two days in the week would be covered by management employees.

25. In addition to the paid employees the Blackburn at Home shop had the benefit of a cohort of upwards of 20 volunteers. Generally, there would be between four and eight volunteers in attendance in the shop on any given day. Volunteers were free to come and go in accordance with their own needs and wishes. It would often be the case that the volunteers would all have left before the shop closed for the day and so for a period of time, sometimes up to two hours, Mr Delmonaco or store manager would be left entirely alone in the store at the end of the working day. This was particularly the case at weekends.

Commencing employment

26. Mr Delmonaco was successful in his application for the retail assistant role. In accordance with the respondent's procedure, he was sent a pre-employment medical questionnaire along with his terms and conditions of employment in advance of starting work. That questionnaire asked whether the candidate considered that they had a disability covered by the Equality Act 2010. Mr Delmonaco answered "yes" to that question, and stated:

> *"I have Marfan syndrome which sadly means in my case I get punctured lung due to soft tissue/muscle. There is currently no treatment for it but requires hospital due to release of air on the wrong side of my lung."*

27. Mr Delmonaco also recorded that he had had 12 days' sickness absence in the last four years. He documented his ongoing hospital monitoring and stated that he was admitted to hospital regularly (about once a year) for spontaneous punctured lung due to Marfan syndrome.

28. The form asked whether Mr Delmonaco believed that he would require any specific adjustments or adaptations to the work environment to help with any health/medical issues he may be experiencing. Mr Delmonaco ticked "no".

29. During cross examination the respondent sought to establish that Mr Delmonaco ought to have been aware that he would inevitably require adjustments to this role, and therefore ought to have ticked 'yes'. The Tribunal does not accept this. Mr Delmonaco cannot be criticised, certainly at this early stage, for taking the view that he did not consider that adjustments would be required to the role. This is all the more so given that the respondent did not make the requirements in relation to heavy lifting, overtime or lone working express during the recruitment process.

30. The questionnaire was simply filed by the respondent. The respondent's evidence is that it would be reviewed by HR (specifically, Laura Ahmed) and referred

to occupational health if there was a cause for concern. There was no cause for concern here because the claimant had not indicated that adjustments were required. The Tribunal is surprised that Ms Ahmed felt qualified to reach such a judgment on the basis of the information given by the claimant.

31. Mr Delmonaco started work on 25 February. He was working alongside Julie Kelly, who was the recent appointment to the Store Manager role. Ms Davies for the respondent gave second-hand evidence that Ms Kelly had told her that Mr Delmonaco had told Ms Kelly from day one that he could not do heavy lifting due to his health condition, and as Ms Davies put it, "*all he could do was sit at the checkout counter to serve customers who wanted to make a purchase*". Mr Davies went on to say that this had placed a burden on Ms Kelly and the volunteers, some of whom are elderly. Not only was Ms Kelly not called as a witness but there was no documentary evidence of this from her, for example no statement prepared for the purposes of an internal investigation or even account by email.

32. This assertion causes the respondent some difficulties. If Ms Davies is correct then, for a number of weeks, Ms Kelly was seemingly able to accommodate Mr Delmonaco in his role of simply sitting at the till. Although she refers to this having caused additional work for herself and others, there is no suggestion that it was escalated to management outside of the Blackburn store during the period that Mr Delmonaco was in active employment. The alternative, of course, is that Mr Delmonaco was actually able to participate in manual handling to a similar degree to others employed or volunterring within the store. That is his case. We accept that all employees and volunteers were given manual handling training and that, as such, they would be advised not to undertake solo lifts of heavy furniture items such as dining tables or beds, and to minimise the strain when lifting smaller items alone and participating in dual lifts for larger items. We find that Mr Delmonaco was in fact able to (and did) participate in the lifting required within the store to a sufficient extent that he did not disrupt the day-to-day running of the store. We further find that there would be occasions where the 'lean staffing' model of the respondent meant that lifting could not safely be done at all – for example, if a member of the public sought to donate a large item of furniture at the end of the day when there was only one member of staff available, or if furniture was required to be moved around 'two-handed' when the only volunteers present were elderly and could not participate safely in heavy lifting. The store did not grind to a halt on these occasions, and we therefore find that the reality of the demand for heavy lifting was less constant than portrayed by the respondent's witnesses.

33. Mr Delmonaco was off for one day on his second day of employment, 26 February. A return to work interview was conducted by Julie Kelly and recorded in a return to work interview form dated 6 March 2019. It records that Mr Delmonaco has had two days off self-certified absence due to pleurisy on the lung and that he is to rest for a couple of days. We find that if there had been discussions between Mr Delmonaco and Ms Kelly about his inability to lift, either at the outset of his employment or as a result of this absence which occurred very shortly thereafter, it would most likely have been recorded on this form. It isn't. In fact, Mr Delmonaco worked without incident throughout the month of March and the first half of April.

17 April 2019 Pneumothorax

34. An episode occurred on 17 April where Mr Delmonaco suffered a spontaneous pneumothorax whilst on his way to work. Staff at the bus station called an ambulance and alerted the respondent that he would be unable to attend work that day. Mr Delmonaco subsequently produced a GP sick note certifying his absence to 27 April 2019.

35. Mr Freethy was concerned about the prospect of Mr Delmonaco's return to work in view of this episode and in view of the content of the pre-employment health questionnaire which had come to his attention as a result of this episode. He discussed the matter with his line manager, Ms Davies, and with Laura Ahmed. It was agreed that a referral would be made to Occupational Health and a referral form was duly completed. It is not clear from the referral form who completed it or the exact date that it was completed on, however it gives some basic details about the case history and then asks the question "*would Stephen's lung condition be worsened by the environment he works in i.e. dust, textiles, heavy lifting etc?*" From a menu of standard questions, it also asks:

(1) Is there an underlying medical condition?

(2) Is he fit to undertake his duties?

(3) Are the provisions of the Equality Act (disability) likely to apply?

(4) Are there any adjustments you recommend?

(5) If he likely to be able to give reliable and effective service/attendance in the future?

(6) Is there additional help or support you can recommend?

36. The referral was made to Melanie Leek, who was a contact of Ms Davies. In her report, Ms Leek describes herself as an Occupational Health Practitioner working through a business called 'Absence Management Applied Resolutions'. The Tribunal was given no information regarding her qualifications, specialisms or experience, beyond that Ms Davies considered her to be "very thorough". The referral resulted in a telephone call to Mr Delmonaco from Ms Leek on 29 April 2019. Mr Delmonaco had been informed only that day that he could expect a call and when it came he agreed to take it. His uncontested evidence is that the call lasted little more than 15 minutes.

37. Ms Leek produced a report dated 29 April 2019. The report outlined in broad terms Mr Delmonaco's employment history with the respondent as well as giving basic information about Marfan syndrome. It refers to Mr Delmonaco stating that he had been advised by a hospital consultant that he should not work in excess of 25 hours per week. It also stated that Mr Delmonaco had raised concerns that he believed working additional overtime hours alongside moving heavy furniture may have impacted on his health, and comments elsewhere that Mr Delmonaco believed he could manage the requirement to move furniture by pushing the furniture as opposed to carrying it.

38. The key part of the report is on the second page under the heading "Fitness for work and adjustments". It says:

> *"Considering the information gleaned from Mr Delmonaco during the consultation I am of the opinion that he is currently unfit to resume the unrestricted duties of his current role without the risk of exacerbating his chronic health issues. However, Mr Delmonaco may be fit to return to work should it be possible to accommodate the following restrictions:*
>
> *(1) Mr Delmonaco should refrain from lifting weights in excess of 6kgs.*
>
> *(2) Mr Delmonaco should, as advised by his consultant, not work in excess of 25 hours;*
>
> *(3) Mr Delmonaco must not undertake lone working."*

39. The Tribunal was deeply surprised by the superficiality of the investigation undertaken by Ms Leek and the resulting report. She did not, for example, seek access to Mr Delmonaco's medical records, nor did she seek to put any questions to his treating clinicians. There was no process for him to confirm or elaborate on the information that she had gleaned during a short telephone conversation at a time when he was unwell. There was no suggestion that the respondent may want to consult a more senior or specialist clinician before reaching final decisions about the limitations that Marfan's syndrome might give rise to in his particular case. It is symptomatic of the somewhat slipshod nature of the report that Mr Delmonaco's name is in fact misspelt throughout it as Mr Monaco.

40. Julie Kelly conducted a return to work interview with Mr Delmonaco on 1 May 2019. In that form Mr Delmonaco indicated a request to do his contractual set hours of 21 hours per week for the next few weeks as he was not ready for overtime yet. It also states that he should do no heavy lifting until fully recovered and that he was currently not physically able to work alone. It is clear even from this brief document that Mr Delmonaco was making a distinction between what he was able to do (and therefore adjustments that may be required during a recovery period following an episode of pneumothorax) as against what he was able to do generally during periods when he was well. The fact that there is no such distinction in Ms Leek's report raises further doubts as to whether she correctly interpreted what Mr Delmonaco was saying to her, and whether she had given any consideration at all to the distinction between recuperation and general health and ability when she prepared her report.

Dismissal

41. Mr Delmonaco was provided with a copy of Mr Leek's report on Saturday 4 May and invited to attend a meeting to discuss it on Tuesday 7 May. This meeting was held with Paul Freethy and Ms Ahmed. From the outset of the meeting Mr Delmonaco robustly disputed the restrictions which Ms Leek had proposed, for example he states that he did not know where she had got the 6kgs from as his son weighed 9kgs and he was "fine with that". He said that he did not recall particular weights being mentioned in the phone conversation. He also disagreed that he was unable to undertake lone working, pointing out that he was alone all the time outside of work and takes his children out by himself. He also made the distinction between being able to do overtime normally but not able to do it when he was recuperating.

He said that he could cope with moving furniture by pushing it rather than lifting it and suggested getting a flatbed trolley to assist because he thought he would be able to lift heavy items onto a flatbed trolley and then manoeuvre them. He also suggested it might be appropriate to extend sickness absence trigger points in his case.

42. After this meeting Mr Freethy instructed Ms Ahmed to revert to Ms Leek for further information. There is no record of that conversation. We have been provided instead with an email from Ms Leek dated 7 February 2020 (the period when the respondent was preparing for this case). The gist of the email is that the weight lifting recommendation and the 6kg limit came from Ms Leek's own assessment of Mr Delmonaco's capabilities in view of the condition that he suffered from. The recommendation for no lone working also came from her. She considered spontaneous pneumothorax could be a life-threatening condition that required immediate medical treatment and lone working was therefore not appropriate. As for the recommendation of no overtime, she explained that as coming from the recommendation from Mr Delmonaco's hospital consultant that he should not work in excess of 25 hours. That recommendation was disclosed to her during the conversation with Mr Delmonaco.

43. Notwithstanding the fact that Mr Delmonaco had clearly called into question whether these recommendations were appropriate and necessary during his meeting with Mr Freethy, neither Ms Leek nor Mr Freethy nor Ms Ahmed at this stage seems to have considered it to be appropriate to take any additional steps, for example to review Mr Delmonaco's medical records, to seek further information from his own clinicians, to arrange for an extended and more detailed appointment with Ms Leek and Mr Delmonaco, or to seek input from any independent specialist.

44. Mr Freethy gave consideration to whether Mr Delmonaco's continued employment could be accommodated given the three key limitations put forward by Ms Leek. His conclusion was that it could not. He considered that it was necessary for Mr Delmonaco to be able to life more than 6kgs in order to work in store. He did not consider that the provision of a flatbed trolley would assist because Mr Delmonaco would be unable (under Ms Leek's recommendations) to lift items of any weight onto the trolley. He did not consider that it was possible to continue the role with no requirement for overtime. This was in view of the "lean" structure of the respondent's paid staff and the fact that retail assistants would be required to cover the work of retail managers. He further did not consider it possible for Mr Delmonaco to continue in the role if he was unable to undertake lone working. This is due to the fact that volunteers could not be relied on to be always in the premises.

45. At this point Mr Freethy therefore decided that Mr Delmonaco's employment could not be continued and that he would have to be dismissed on grounds of capability. Given this decision it was unnecessary for him to consider Mr Delmonaco's proposed adjustment of adjusting trigger points within the respondent's absence policy. The conclusion that Mr Freethy reached the decision to dismiss at this point, without any further meeting with Mr Delmonaco, is in accordance with his own direct evidence to that effect.

46. Nonetheless, on 9 May 2019 Mr Delmonaco was sent a letter inviting him to a meeting to be held on 14 May 2019. The purpose of that meeting was purportedly to discuss the content of the Occupational Health report. The letter stated amongst other things that:

> *"Should we not be able to accommodate the adjustments a possible outcome of this meeting may be termination of your contract with NWAA."*

47. In fact, such an outcome was not "one possible" result of the meeting, but pre-determined as the only result of the meeting. In essence, from the moment Mr Freethy had received Ms Leek's report he had closed its mind to the possibility of continuing Mr Delmonaco's employment and determined that dismissal was inevitable.

48. In the event the meeting was postponed by one day to 15 May 2019 and Mr Freethy was unable to attend. It was conducted in his absence by Ms Ahmed. Although Ms Ahmed did engage in further discussion with Mr Delmonaco about the restrictions proposed by Ms Leek, there was nothing that Mr Delmonaco could have said at that point that would have made any difference. Ms Ahmed was there (as Mr Freethy told us) simply to convey Mr Freethy's decision that Mr Delmonaco was going to be dismissed, and at the conclusion of the meeting she duly did that.

49. That dismissal was confirmed by a letter dated 16 May 2019 from Ms Ahmed. At the end of that letter Mr Delmonaco was informed that he had the right to appeal the decision to terminate his employment to Ms Davies.

50. Mr Delmonaco duly set out a letter of appeal over some four pages dated 18 May 2019. He went through his own medical history and his employment history before outlining in a section headed "Points of Appeal" the reason why he took issue with Ms Leek's report and the restrictions that she said needed to be imposed.

51. Mr Delmonaco was invited to an appeal hearing to take place on 5 June and to be chaired by Ms Davies. We note that although Ms Davies carried the title of Director of Income and Engagement she was not an employee of the respondent but was engaged on a consultancy basis. Detailed notes were taken of that meeting and Mr Delmonaco accepted that those notes were largely accurate. Ms Davies did not announce an outcome in the meeting but adjourned to consider her decision.

52. The appeal outcome letter is undated but was sent to Mr Delmonaco under cover of an email on 13 June 2019. It is three pages long and goes into matters in some detail. Essentially, however, the respondent maintained the position that it must abide by the three restrictions taken from Ms Leek's report and that it was not possible to adjust the role in line with those restrictions. That being the case, dismissal was the only option.

53. We pause here to note that Ms Davies was questioned about what her real concern was in relation to Mr Delmonaco remaining in employment. The angle of the questioning seemed to be to seek to establish that she was concerned more with the reputation of the shop, the security of the premises, and potentially losing business if

the shop had to close early, than she was with the health and safety of Mr Delmonaco.

54. We consider that the concerns that the respondent had about security if Mr Delmonaco was to suffer a pneumothorax during a period of lone working were genuine. (That is not to say they were necessarily reasonable, which is a question discussed further below.) It was entirely legitimate for the respondent to be concerned about the shop being left unattended, and that does not undermine a separate. but related, concern for an employee's health and safety. Having said that, however, all the members of the Tribunal were surprised by the way in which Ms Davies couched some of her answers. She appeared to suggest that even if it could be guaranteed that there were would be other people employed in the shop when Mr Delmonaco suffered a pneumothorax she would still be reluctant to have him employed due to the risk of such an event occurring. She stated that it would be "very distressing" and "shocking" for volunteers and potentially members of the public to observe such an event.

55. Whilst it may be concerning or even distressing, for an observer to find themselves in this position, we are deeply concerned by the implication that that is somehow Mr Delmonaco's problem and also by the logical conclusion that Ms Davies would be uncomfortable with him working in the respondent's organisation even if the concerns around lifting, lone working and overtime could be entirely set aside.

56. Ms Davies' letter noted that Mr Delmonaco's colleagues and line manager spoke highly of his customer service skills and enjoyed having him as a colleague. We find that, throughout his short employment, Mr Delmonaco proved himself to be well-suited to the role and a good employee in all respects except for those limited by his disability.

The Law

57. We have had regard to the EHRC Code of Practice on Employment (2011) ("The Code").

Section 13 – Direct discrimination

58. Section 13 EqA provides:

> ***(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.***

59. Claims of direct discrimination require a comparison between Mr Delmonaco and a comparator who does not share the protected characteristic, but who does share all other material characteristics of Mr Delmonaco. The nature of this comparison as it applies where the protected characteristic is disability was resolved and explained by the House of Lords in the case of **Lewisham London Borough Council v Malcolm [2008] UKHL 43**. The effect of ***Malcolm*** is that direct discrimination claims will rarely be effective in disability cases.

Section 15 – discrimination arising from disability

60. Section 15 Equality Act 2010 ("EQA") provides:

> ***(1) A person (A) discriminates against a disabled person (B) if—***
>
> ***(a) A treats B unfavourably because of something arising in consequence of B's disability, and***
>
> ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

61. The elements of discrimination arising from disability can be broken down as follows:

a) Unfavourable treatment causing a detriment
b) Because of "something"
c) Which arises in consequence of Mr Delmonaco's disability

The respondent will have a defence if it can show:

a) The unfavourable treatment is a proportionate means of achieving a legitimate aim – "objective justification"; or
b) It did not know, and could not reasonably have been expected to have known, that Mr Delmonaco had the disability – the "knowledge defence".

62. The nature of the two-step test to be applied in considering a s.15 claim (identifying the "something arising" and separately identifying whether that "something" was the reason for the unfavourable treatment) is explained and discussed in **Basildon and Thurrock NHS Foundation Trust v Weerasinghe [2016] ICR 305** and **Pnaiser v NHS England and anor [2016] IRLR 170 EAT**.

63. The respondent will successfully defend the claim if it can prove that the unfavourable treatment is a proportionate means of achieving a legitimate aim. This is the same test as for indirect discrimination, and for direct discrimination on the grounds of age. Although there is limited legal authority on justification in the context of s15 claims, principles developed from the application of the test in those other claims will be highly relevant.

64. The burden of proof in establishing both elements of the justification test lies with the respondent. In many cases, the aim may be agreed to be legitimate but the argument will be about proportionality. This will involve an objective balancing exercise between the reasonable needs of the respondent and the discriminatory effect on Mr Delmonaco: a test established in the context of indirect discrimination in **Hampson v Department of Education and Science [1989] ICR 179 CA**.

65. In conducting this balancing exercise, any failure to comply with the duty to make reasonable adjustments will be relevant. Para 5.21 of The Code states "*If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.*"

66. Cost alone will not provide a justification for discriminatory treatment: **Woodcock v Cumbria Primary Care Trust [2012] ICR 1126, CA**.

Section 19 – Indirect discrimination on grounds of disability

67. Mr Mensah withdrew the claim for indirect discrimination during submisisons. We have not therefore set out the law as it relates to that claim.

Section 20-21 – Failure to make reasonable adjustments

68. The duty to make reasonable adjustments is found primarily in sections 20 and 21 EqA, the key statutory language for the purposes of the present case, being set out in s.20(3):

> **(1) …where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.**

69. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

70. The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT **in Environment Agency v Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland v Ashton [2011] ICR 632.**

Submissions

71. On the second day of the hearing, Mr Mensah and Ms Eeley both produced detailed written submissions extending over fifteen and eleven pages respectively. In reviewing Mr Mensah's submissions, prior to hearing oral argument, the Tribunal were surprised to note that they appeared to depart in significant ways from the way in which the case had been put in the list of issues.

72. As well as 'moving the goalposts' (as Ms Eeley put it) in relation to the disability claims, there was also a long section of Mr Mensah's document devoted to the principles to be applied by a tribunal assessing capability dismissals, drawing on authorities which pre-dated the Disability Discrimination Act 1995 such as **Spencer v Paragon Wallpapers Ltd [1977] ICR 301** and **Lyncock v Cereal Packaging Ltd [1988] ICR 670**. Mr Mensah readily clarified that he was not seeking to advance an unfair dismissal claim (unavailable due to Mr Delmonaco's short service) but that he considered the principles from these cases to be informative in determining whether the dismissal was discriminatory. The Tribunal do not share that view, and whilst we read Mr Mensah's submissions, we were careful to direct ourselves to the relevant tests and principles pertaining specifically to the claims being advanced.

73. In respect of those claims, Mr Mensah sought to redefine the PCPs being relied upon for the purposes of the indirect discrimination and reasonable adjustments claim, and to redefine the 'something arising' relied upon for the

purposes of the s15 claim. During discussion, Mr Mensah informed the Tribunal that the indirect discrimination claim would be withdrawn altogether.

74. In respect of the other proposed changes to the way in which the claims were being advanced, we invited both counsel to address us on whether we should consider the new way the case was being put, or limit ourselves to the issues as set out in the agreed list, indicating that we would make a final determination as part of this reserved decision, having given careful consideration to the content to the claim form itself. We also invited Ms Eeley to take more time to consider her submissions in response. Following an initial five minutes, she indicated that she was content to proceed. In the discussion below, we set out the extent to which we were (or were not) prepared to consider the case in the way Mr Mensah proposed.

Discussion and Conclusions

Direct Discrimination

75. The only act alleged to be direct discrimination is the dismissal itself. S39(2)(c) EqA provides that an employer must not discriminate against an employee by dismissing them. Under s13, that impermissible discrimination will have occurred where the employer treats that employee less favourably than a real or hypothetical comparator due to (in this case) the protected characteristic of disability.

76. Mr Delmonaco does not rely on any real comparator. We are satisfied that the appropriate hypothetical comparator in this case is an employee whom the respondent considered was subject to the same limitations as it considered Mr Delmonaco was subject to following Ms Leek's report. That is (however improbably) a non-disabled employee whom the respondent had been advised could not lift weights heavier than 6kg, could not work more than 25 hours per week and must not undertake lone working.

77. We are satisfied that the respondent would have dismissed such a hypothetical employee, and therefore the claim of direct discrimination fails.

Discrimination arising from disability

78. The agreed List of Issues characterised Mr Delmonaco's dismissal as 'something arising' from his disability. That is a confusion of the test (as recognised in Ms Eeley's submissions). Essentially, we are looking to identify a three-link chain: a disability – something arising from that disability – unfavourable treatment. In this case the dismissal is the final link in the chain, there must be 'something arising' which connects it back to the disability.

79. Leaving aside the dismissal, there were three candidates for the 'something arising' identified in the list of issues, namely: Mr Delmonaco's sickness absence; Mr Delmonaco's request for adjustments to enable him to return to work and the respondent's perception of his disability. The first two have their origins in paragraph 31 of the Particulars of Claim, the third appears to have been added when the parties agreed the List.

80. Mr Mensah departed from these in his argument and instead submitted that "Mr Delmonaco was dismissed because of a. the risk of him not being able to work alone; b. the risk of the store being unlocked and c. the risk of cash in the store not being securely/properly accounted for."

81. Ms Eeley objected to the tribunal considering these alternative grounds, arguing that the respondent's case had been prepared on the basis of the List of Issues.

82. There is a kaleidoscope of possibilities regarding the various factors in Mr Freethy's decision to dismiss (and Ms Davies decision to confirm the dismissal). The weight given to the respective concerns around lifting, overtime and lone working, and the characterisation for those concerns as either justified or unjustified, benevolent or self-interested, rational or derived from stereotyping, has occupied much of the evidence in this case.

83. Whatever the exact balance of those factors in the minds of Mr Freethy and Ms Davies, however, it is a stark and obvious truth that any limitations to Mr Delmonaco's ability to fulfil this role – whether actual or wrongly perceived by the respondent – all arose directly from the fact he suffers from Marfan syndrome. That was in the forefront of the mind of all of the witnesses at the time these events took place and throughout all the evidence. It is important for the Tribunal to characterise what we find the 'something arising' to be, because that will be the lens through which the respondent's justification argument must be viewed, but it would be wholly wrong for a claim such as this to be defeated on a technical 'pleading point' simply because Mr Delmonaco alighted on a formulation of the 'something arising' which this Tribunal may not ultimately agree with.

84. Turning then, to our findings as to what the 'something arising' actually was. We find that Mr Delmonaco's sickness absence did not cause or materially contribute to his dismissal. There is nothing to suggest that the respondent could not have happily accommodated a two-week absence, nor that the capability dismissal was based on any concern about unacceptable absence levels having been reached or anticipated. We also find that his own request for adjustments (put forward as a counter-proposal to those suggested by Ms Leek) was not a material cause. The respondent did not accept that those adjustments would answer its concerns, but the fact that he had proposed them did not, of itself, have any repercussions for Mr Delmonaco.

85. We find that each of the three matters latterly put forward by Mr Mensah played a part in the thinking of both Mr Freethy and Ms Davies, but they are only part of the picture in a broader kaleidoscope of concerns we have referred to above. That picture is, in fact, most aptly summarised in the third matter identified in the List of Issues, specifically, "the respondent's perception of his disability".

86. Ms Eeley's response to this is that Mr Delmonaco was not dismissed due to the respondent's perception, but due to the substance of the limitations caused by the disability. She says (para 26) "*C's claim implies R had an unjustified perception of the disability. It did not. It had a realistic appraisal of the disability which was*

evidence based…R acted on the impact of the disability, not its 'perception' of disability." Even in making these submissions, the respondent is acknowledging that that dismissal was caused by something arising from the disability – in its view, the limitations.

87. It is wrong to suggest that a 'perception' necessarily connotes an unjustified perception. The formulation of the 'something arising' as "the respondent's perception of Mr Delmonaco's disability" leaves sufficient room for both parties' positions, whilst acknowledging the starkly obvious conclusion that, on either case, the dismissal was caused by something arising from the disability. However, in order to properly address justification, we consider it necessary to be a little more specific about what that 'perception' was. We find that the 'something arising' from Mr Delmonaco's disability was the respondent's perception that Mr Delmonaco's ability to perform his role was permanently limited in the three ways set out in Ms Leek's report.

88. Against that finding, was the dismissal justified? The legitimate aims contended for by the respondent are *(1) That Mr Delmonaco was able to work safely, taking into account the nature of his condition* and *(2) That the shop was not left unattended and unsecured, which was a significant risk given that Mr Delmonaco could suffer from a collapsed lung in the future.* The Tribunal fully accepts that it was a legitimate aim that Mr Delmonaco was able to work safely, and that the shop was not left unattended and unsecured. The additional wording in the second aim is, however, not apposite in the formulation of a legitimate aim.

89. Was dismissal a proportionate means of achieving those aims? In assessing this, we have regard to the respondent's duty to make reasonable adjustments. As noted in The Code (see para 64 above), it will be difficult for an employer who has failed to make reasonable adjustments to show that unfavourable treatment is objectively justified. For reasons set out below, we have found that there was no actual failure to make reasonable adjustments in this case. However, in the circumstances of this case we consider it appropriate and necessary to have regard to the duty which the respondent would have found itself under if employment had continued, and the extent to which the respondent might reasonably have made adjustments as an alternative to dismissal.

90. Whilst we accept that dismissal may be a proportionate means in some cases, it must be the last resort. By definition, any step short of dismissal which would enable the aims to be achieved would be more proportionate.

91. It is for the respondent to show that there was no more proportionate way of achieving the legitimate aims, and we find that they have failed to do that.

92. In relation to the legitimate aim that Mr Delmonaco should be able to work safely, the respondent has relied on Ms Leek's report to form a conclusion that Mr Delmonaco is unable to work safely if he is required to lift weights of more than 6kg. We accept Mr Delmonaco's evidence that he has never been given such advice by his treating clinicians. Whilst Ms Leek no doubt has some expertise in the broad field of occupational health, she does not purport to be a doctor, far less an expert in this

relatively rare and varied condition. There is no indication in her report as to where this figure comes from, and the summary of the phone call seems to suggest (as Mr Delmonaco has repeated asserted) that its genesis is in general guidance pertaining to the 'stereotypical' abilities of a Marfan's sufferer.

93. It is obvious that the ability to work safely must be an aim in respect all workers, and that Mr Delmonaco's non-disabled colleagues cannot be permitted or expected to undertake unrestricted solo lifting. We consider it likely that, properly assessed and investigated, the 'ability gap' between what Mr Delmonaco could safely be permitted to lift (outside a recovery period) and what another employee/volunteer could safely be permitted to lift might well be relatively small, particularly if provision was made for a trolley as he suggested. Bearing in mind our findings above regarding Mr Delmonaco's good performance at other aspects of the role, the variety of goods the shop dealt with other than furniture, the availability of others to assist with lifting and the respondent's ability to operate the shop with a lone worker (and therefore without two-person lifting) for periods of time, it is entirely possible that reasonable adjustments could be made in respect of any remaining gap. We accept that it was not reasonable for the respondent to allow Mr Delmonaco to push furniture (contrary to manual handling recommendations) but appropriate training and the provision of the trolley suggested by Mr Delmonaco ought to have been sufficient to prevent him feeling he needed to do this.

94. In relation to the overtime limitation, Ms Leek's conclusion has more foundation here as it was reported by Mr Delmonaco as being the advice of his consultant. This fits in with his enquiries at the initial interview (for the store manager role) as to whether the role could have been done on a part-time basis. The respondent's case on overtime is summarised at 30(c) of Ms Eeley's submissions – '*Regular overtime was part and parcel of the job. Without it, adequate cover at the shop could not have been provided.'* Mr Delmonaco accepted that this was the case and argued that he would be able to fulfil this requirement outside a period of recovery. However, the Tribunal notes that, again, there is no evidence of the need for regular overtime being identified in a job advert or description, or in the terms and conditions document signed by Mr Delmonaco. Mr Delmonaco had indicated that he could undertake occasional overtime to cover sickness and holiday and this is not necessarily at odds with his consultant's recommendation. Again, further investigation should have taken place to gauge more accurately the real limits of Mr Delmonaco's abilities. Even if those limits were permanently incompatible with the overtime requirement demanded by the respondent, then it seems to us that this is an area where adjustments could readily have been made. There would be no cost duplication in offering the overtime shifts to a worker from another store, or to an additional part-time worker. By definition, Mr Delmonaco would not be receiving payment for the additional shifts he was not doing. Whilst there may be some managerial or recruitment costs in arranging cover for these shifts, and it may be more convenient for them not to do so, that is in the nature of the obligations placed by society on employers in aid of enabling disabled workers to access employment.

95. In relation to the lone working limitation, this relates to both the legitimate aims. We accept Mr Delmonaco's case that this limitation was a somewhat panicked and unjustified reaction to the events of 17th April, initially by Ms Leek and then by Mr

Freethy and Ms Davies. Lone working in a retail environment carries particular risks irrespective of disability. Anyone can be a victim of criminality, or of an unforeseen health emergency, both of which carry more risk in a lone working scenario. Beyond that general risk, there are huge swathes of workers who may have increased risk – people with asthma, epilepsy, diabetes etc. Others may be more likely to have to leave and close the shop early due to, for example, caring responsibilities (albeit in those situations the concern over the shop being secured should not arise). Mr Delmonaco accepts that there was a risk of him having to close the shop due to a spontaneous pneumothorax occurring but points to the low likelihood of this given the infrequency of these events and the limited amount of lone working actually required. He also contends that the risk of him actually leaving the shop unsecured was vanishingly small, as he had not lost consciousness during an episode in some 15 years since the operation on his right lung. The respondent characterises this as a self-serving account, and points to apparent conflicts in the way he described his condition during meetings. If Mr Delmonaco's account is correct, then it would suggest that the risk of the shop being left unsecured is not substantively more serious than the risk for lone workers generally.

96. Given the discrepancy between Ms Leek's stark prohibition and Mr Delmonaco's assertion that he could safely work alone (and had done so successfully for months at his former employer) it was incumbent on the respondent to do more to thoroughly and robustly assess the real risk to Mr Delmonaco of lone working. This might have involved communicating with the former employer, seeking to obtain medical records and/or more specialist medical advice and/or using risk assessment tools. In striking a balance between the risk (to both Mr Delmonaco and the shop) and the obligation not to discriminate, it was not enough for the respondent to rely on the cautious advice of an occupational health practitioner formed on the basis of a fifteen-minute phone call.

97. There is some force in the respondent's submission that once they were in possession of Ms Leek's report they may have been vulnerable to another type of claim if they had simply allowed Mr Delmonaco to continue working. We do not accept that one can jump straight from that conclusion to the conclusion that dismissal was proportionate. We note that the respondent was able to put adjustments in place which accommodated Ms Leek's limitations for a period of a few weeks whilst the dismissal process took place. It would have been equally possible to use that time to conduct the further investigations necessary to provide a more credible and robust assessment of how Marfan's syndrome, as experienced by Mr Delmonaco, actually limited his ability to do this role. In view of that assessment, the question of on-going reasonable adjustments (including, for example, the flatbed trolley suggested by Mr Delmonaco to assist with reducing the need to carry furniture) could have been given proper consideration.

98. In conclusion, we find that dismissal in the circumstances of this case was not proportionate and therefore not justified. This part of Mr Delmonaco's claim therefore succeeds.

Indirect discrimination

99. As noted above, this claim was withdrawn.

Failure to make reasonable adjustments

100. The starting point in a reasonable adjustments case is to identify the provision criteria or practice which placed Mr Delmonaco at a substantial disadvantage. The three alleged PCPs set out in List of Issues were:

> **(1) The respondent's policy not to allow Mr Delmonaco to carry out lone working due to his condition;**
>
> **(2) The respondent's absence management policy placed Mr Delmonaco at a disadvantage;**
>
> **(3) The requirement by the respondent that he attend an Occupational Health assessment following the incident on 17 April 2019.**

101. Mr Mensah's written submissions did not address the issue of PCPs at all, instead jumping straight to the adjustments he argued should have been made. On questioning, he submitted that the ET ought to find the following PCPS:

(1) *The respondent's policy not to allow the claimant to carry out lone working due to his condition.* (Which was identified in the List of Issues).
(2) *The policy of not providing a flatbed trolley.*
(3) *The policy of requiring retail assistants to complete overtime.*
(4) *The policy of not providing cover for periods of absence.* (The final three were formulated by Mr Mensah 'on the hoof' during the discussion prior to oral submissions).

102. Save for (3), The Tribunal is not persuaded that any of those PCPs are formulated in a way which is apt given the mechanism of s.20/21 and the circumstances of this case. Looking at the adjustments contended for by Mr Mensah (provision of a flatbed trolley, reduced overtime and cover in the event that Mr Delmonaco was unwell) one could work backwards and construct appropriate PCPs around the respondent's requirement that retail assistants undertake lifting and moving of furniture, the respondent's requirement that retail assistants regularly work up to 14 hours of overtime per week (essentially identified by Mr Mensah as point (3)) and the respondent's requirement that retail assistants are able to function as lone workers.

103. However, the question of whether or not it would be appropriate for the tribunal to allow the case to progress on the basis of PCPs which have not been contended for by a professionally represented claimant (but may be obvious) becomes a moot point in view of the following analysis.

104. We consider that no obligation to make reasonable adjustments in respect of any PCP arose before 17th April 2019 as the respondent was (reasonably) unaware of any substantial disadvantage caused to Mr Delmonaco up until that date. Following that date, there was no obligation to make adjustments during the period when Mr Delmonaco was absent from work. In the final period, between his return to work and dismissal, adjustments were made which fully mitigated the disadvantage. Of course, Mr Delmonaco argues that those adjustments went further than was necessary, but that does not make them unreasonable for the purposes of a s.20/s.21 claim.

105. The respondent considered that it could not sustain those adjustments indefinitely, hence the dismissal. It was that decision which we have found to be discriminatory under s.15. If the employment had continued, then it is very likely that some adjustments would have had to be made on a temporary basis to accommodate Mr Delmonaco's recovery periods, and at least possible that some adjustment would have had to be made on an on-going basis. If the appropriate adjustments had not been made then there may well have been a legitimate claim. However, the particular circumstances of this case mean that, in the analysis of this tribunal, there was no actual breach of the s.20-21 duty during the course of employment.

Remedy Hearing

106. A remedy hearing has been listed to take place on **18th November 2020** and the parties will receive a notice of hearing in due course. This date was listed without canvassing the availability of the parties or their representatives and any application to postpone the hearing due to non-availability should be made promptly, with both parties providing dates of availability up to and including May 2021.

107. Any additional documents relevant to the question of remedy should be exchanged by **28 October 2020** and the respondent shall ensure that a remedy bundle is prepared with sufficient copies being provided to the tribunal in advance of the remedy hearing.

108. Should either party wish to rely additional witness evidence, witness statements must be served on the other party by no later than **4 November 2020**.

Employment Judge Dunlop

Date: 28 September 2020

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

30 September 2020

FOR THE TRIBUNAL OFFICE